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Supreme Court, U.S.
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No. 03-587

IN THE

Supreme Court of the United States

WANDA M. BRYANT,

Petitioner,

v.

AIKEN REGIONAL MEDICAL CENTERS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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ARGUMENTS IN REPLY FOR GRANTING WRIT

I. There Is A Conflict Among The Circuits About The Appropriate Level Of Deference To Be Afforded To Jury Determinations Of Liability For Punitive Damages.

The parties in this case agree about what happened below: the Fourth Circuit decided, as a matter of law from its own review of the record, that Defendant established the good-faith defense to punitive damages recognized by this Court in *Kolstad*. What the parties disagree about is whether the application of the *Kolstad* standard, where the facts and inferences are hotly disputed at trial, should be made by the jury or by the appellate court. The parties also disagree sharply about how other circuits have treated this issue. With all due respect, the Fourth Circuit's holding that the jury's determination in this regard is not entitled to any deference is contrary to other circuits that have afforded such jury findings their proper regard. The approach of the Fourth Circuit below is also contrary to the Re-examination Clause of the Seventh Amendment to the United States Constitution.

Respondent attempts to harmonize the Fourth Circuit's opinion below with seven circuit court decisions. A careful examination of those cases reveals, however, that Respondent has misstated the holdings of those cases or has cited portions of the opinions that have no bearing on the issues presently before the Court.

Respondent cites two cases for the alleged proposition that the *Kolstad* good-faith standard is a matter of law to be decided by the courts. The Respondent's brief contains the following parenthetical for the holding of the Second Circuit Court of Appeals in *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376 (2d Cir. 2001): "*Kolstad* good faith defenses discussed in terms of 'as a matter of law.'" (Br. of Resp., at 7). Respondent has flatly misrepresented the Second Circuit's use of the phrase "as a matter of law." In fact, the

Zimmermann court plainly stated that the good-faith defense could *not* be decided as a matter of law. The actual holding of *Zimmermann* is as follows:

> In this case, the defense *cannot be said to have been established as a matter of law*. . . . Although [the] testimony suffices to permit a finding of [the supervisor's] awareness of federal law requirements, as the Plaintiff contends, and would be somewhat probative of an antidiscrimination policy, it does *not establish as a matter of law* the existence of such a policy, much less good faith enforcement of such a policy. At most, the evidence would have provided some basis for the jury to infer the existence of a policy and its good faith enforcement.

Id. at 385-86 (emphasis added) (citations omitted).

Similarly, Respondent summarizes the holding of *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000), with the following parenthetical: "discusses company's efforts 'as a matter of law' applying the *Kolstad* standards." (Br. of Resp., at 7). What the Eighth Circuit actually stated in *Ogden* is directly contrary to Respondent's implication:

> Concerning its purported "good-faith efforts to comply with Title VII," [defendant] points to its written sexual harassment policy, and a policy of encouraging employees with grievances to contact the home office. *"Plainly, such evidence does not suffice, as a matter of law," to establish "good-faith efforts"* in the face of substantial evidence that the company "minimized" [plaintiff's] complaints; performed a cursory investigation which focused upon [plaintiff's] performance, rather than [the harasser's] conduct;

> and forced [plaintiff] to resign while imposing no discipline upon [the harasser] for his behavior.

214 F.3d at 1010 (emphasis added). Both *Zimmermann* and *Ogden* demonstrate that the defense of good-faith efforts to comply with Title VII is generally a question of fact for the jury, not a matter of law for the court.

Next, Respondent contends that the Fourth Circuit's opinion is a proper application of *de novo* review of the jury's findings with regard to punitive damages. *De novo* legal review does not give an appellate court plenary authority to review the factual findings of the jury. Rather, under *de novo* review, the appellate court makes its own determination of the applicable *legal* standards, without regard to the lower court's ruling. The appellate court is still constrained by the Re-examination Clause of the Seventh Amendment not to disturb the factual findings of the jury if there is sufficient evidence in the record to support them. *See* U.S. Const., amend. VII ("[N]o fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."). The *de novo* standard requires the court first to take all facts and inferences in the light most favorable to the non-moving party and then to inquire whether the plaintiff would be entitled to the relief sought if a reasonable jury's assessment of the facts similarly favored the plaintiff. Only where the material facts are uncontroverted or where the plaintiff's best effort still falls short of the mark — those rare, black-or-white issues — should the court rule as a matter of law; the remaining areas of grey, in whatever gradient, are the province of the jury entitled to Seventh Amendment protection.

The Fourth Circuit in this case ruled that the jury's rejection of the good-faith defense and consequent award of punitive damages is not a factual finding and, therefore, is not entitled to any deference. (App. A, at 18a). The court's ruling was clearly not a proper application of *de novo* review.

Respondent's citation to *Hall v. Consolidated Freightways Corp.*, 337 F.3d 669 (6th Cir. 2003), is especially puzzling. According to Respondent, it cited *Hall* because the Sixth Circuit "addresses whether issue of punitive damages was properly submitted to the jury, not the appellate court's review of the trial judge's *de novo* review of the punitive damages issue." (Br. of Resp., at 7). Petitioner agrees that the proper issue before the Fourth Circuit below should have been whether the issue of punitive damages was properly submitted to the jury. The *Hall* court's discussion in this regard is particularly revealing:

> [T]he district court was correct in asserting that the decision to award punitive damages came down to the credibility of witnesses. Inasmuch as neither the district court nor this Court is permitted to make credibility determinations or to weigh the evidence on a Rule 50 motion, the jury's decision to credit the testimony of Plaintiff's witnesses over that of Defendant's witnesses cannot be disturbed.

Id. at 674. The *Hall* court concluded that "the record is replete with testimony refuting Defendant's alleged 'good faith' efforts." *Id.* at 675. Respondent's suggestion that the Fourth Circuit's decision below is consistent with *Hall* is patently wrong.

Respondent also suggests that the Fourth Circuit's decision below is consistent with the Seventh Circuit's recent case of *Lampley v. Onyx Acceptance Corp.*, 340 F.3d 478 (7th Cir. 2003). Respondent contends that the *Lampley* decision contains "no discussion of an Appeal court's review of a trial court's *de novo* review of punitive damages." (Br. of Resp., at 7). Once again, Respondent's parenthetical summary of the case has little resemblance to the actual holding of the court. The relevant portion of the *Lampley* decision provides as follows:

> [Defendant] asserts that there was insufficient evidence to warrant the imposition of punitive damages. The question of whether [the defendant] is entitled to judgment as a matter of law on this

> issue is subject to *de novo* review, with the evidence and all reasonable inferences taken in the light most favorable to [the plaintiff]. More specifically, we ask "whether no rational jury could have found for the plaintiff."

340 F.3d at 482 (quoting *Mathur v. Board of Trustees of S. Ill. Univ.*, 207 F.3d 938, 941 (7th Cir. 2000)). The *Lampley* court concluded, "Here, there was sufficient evidence for a jury to believe that [the defendant] failed to engage in good faith efforts at Title VII compliance." *Id.* at 483. Obviously, the Fourth Circuit here did not employ the same respect for jury findings as did the Seventh Circuit in *Lampley*.

Finally, Respondent makes the same analytical mistake that ensnared the Fourth Circuit below — confusing the standard for reviewing of the *amount* of the punitive damages verdict with the standard for reviewing the jury's underlying determination of *liability* for punitive damages. Respondent asserts that the Fourth Circuit's decision is consistent with *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000), and *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001). Although both *Romano* and *Swinton* contain separate discussions regarding whether the punitive damage awards at issue were excessive, *see Romano*, 233 F.3d at 672-74, and *Swinton*, 270 F.3d at 817-20, both cases also contain a thorough discussion of the issue presented here: namely, the jury's rejection of the *Kolstad* good-faith defense. *Romano*, 233 F.3d at 670 ("[B]ased on the evidence that was presented to the jury, construed most favorably for the [plaintiff], we find the jury's conclusion in this regard [(rejecting the good-faith defense under *Kolstad*)] was reasonable, and we will not disturb the verdict [for punitive damages]."); *Swinton*, 270 F.3d at 810-11:

> [I]t is well established that it is insufficient for an employer simply to have in place anti-harassment policies; it must also implement them. . . . Surely,

> [the defendant] cannot claim to have *implemented* its anti-harassment policy in good faith (even if it were conceived in good faith) when the very employee . . . charged with carrying it out . . . laughed along with the "nigger" jokes, did nothing to stop them, and never reported the repeated incidents to higher management.

(quotations omitted). Clearly, appellate review of liability for punitive damages is very different than appellate review of the amount of the punitive damages award. The Fourth Circuit's review of the *Kolstad* defense in the instant case was markedly different than that of the First Circuit in *Romano* and the Ninth Circuit in *Swinton*.

An accurate account of the authorities cited in Respondent's brief reveals the Fourth Circuit's divergence from the other circuits in terms of the appellate court's respect for the jury findings behind an award of punitive damages in employment discrimination cases. This Court should grant certiorari to bring the Fourth Circuit into conformity with the other circuits on this important issue.

II. Petitioner Properly Preserved Her Arguments That The *Kolstad* Good-Faith Defense To Punitive Damages Does Not Apply Where The Person Who Discriminated Against The Plaintiff Is The Same Person Responsible For Ensuring The Employer's Compliance With Title VII And Where The Discriminator Is Sufficiently Senior To Be A Proxy For The Employer.

Respondent's second line of attack is to argue that Petitioner failed to raise the "alter ego" theory below and, therefore, is barred from raising it on appeal to this Court. Once again, Respondent's arguments are inaccurate and unavailing. The record clearly reveals that Petitioner preserved these issues for appeal by raising them below, both at trial and on appeal to the Fourth Circuit. Although the

phrase "alter ego" was not actually used, the concept has been in this case since the Defendant's motions for judgment as a matter of law.

Petitioner clearly raised these issues in response to Respondent's motion for JMOL with respect to punitive damages.[1] In denying Respondent's motion for JMOL, the district court thoroughly discussed the actions of Respondent's upper management and their role in the discrimination and retaliation, which justified the award of punitive damages.[2] Furthermore, Petitioner clearly mentioned

1. Petitioner's brief contains the following argument:

> Although Defendant may have had a written policy against discrimination, there was ample evidence that such a policy was never enforced. In fact, the employee who presumably would have been in charge of enforcing the policy, *viz.* the hospital's human resources director, Richard Lowe, was a principal actor in the unlawful conduct that was the subject of Ms. Bryant's lawsuit. Ms. Bryant also testified that when she complained to the chief nursing executive about remaining in central services after becoming a licensed RN, the response was 'I don't see what your problem is.'

(Pl.'s Memo. in Opp. to Def.'s Mot. for JMOL, at 10-11).

2. The district court stated,

> The evidence is, however, more than sufficient to support the conclusion that any written policy was not implemented in good faith and that the discriminatory and retaliatory actions directed towards Plaintiff were sufficiently widespread among multiple persons with managerial and administrative responsibilities to treat those acts as the intentional actions of the employer.

(App. B, at 29a). The district court specifically discussed the actions of the human resources manager,

> Richard Lowe, the person who was responsible for enforcement of the policy during the relevant period.

(Cont'd)

the involvement of these upper-level managers in defending the punitive damages award on appeal to the Fourth Circuit, both in her initial brief,[3] and in her petition for rehearing.[4]

These issues are properly before the Court, and the Fourth Circuit's decision squarely conflicts with the decisions of other circuits, as previously set forth in the Petition for Certiorari.

(Cont'd)

> As discussed below, the direct actions of Lowe himself, as reported by Plaintiff, could be interpreted as showing reckless indifference or actual malice, including evidence sufficient to support the conclusion that Lowe was involved in a concerted effort to deny Plaintiff any advancement opportunities and to encourage her to leave Defendant's employ.

Id. at 30a. The district court also discussed the actions of the Chief Nursing Executive, Mary Ann Angle. *Id.* at 31a.

3. In her initial brief to the Fourth Circuit, Petitioner used the verbatim quote from her brief to the district court, which is set forth *supra* in footnote 1. (Initial Br. of Appellee, at 36). Petitioner concluded, "The actions of these high-ranking employees is sufficient to impute to Defendant liability for punitive damages." *Id.*

4. Petitioner stated, "the individuals who carried out the illegal discrimination and retaliation were among the highest levels of management at the hospital: the director of human resources, the chief nursing executive, and the director of surgical services." (Pet. for Reh'g, at 6). Furthermore, Petitioner argued, "Although Plaintiff did not contest the *existence* of a written anti-discrimination policy, she vigorously disputed whether the policy was ever *enforced* by the hospital. In fact, the very people who should have enforced the policy are the subjects of Ms. Bryant's claims of discrimination and retaliation." (Pet. for Reh'g, at 6).

III. There Is A Split In The Circuits Regarding Whether Tax Enhancement Damages Are Appropriate In Employment Discrimination Cases.

Finally, with respect to the tax enhancement remedy requested by Petitioner, two circuit courts of appeals have expressly permitted tax-based adjustments to back-pay awards in employment discrimination cases. In *Gelof v. Papineau*, 829 F.2d 452 (3d Cir. 1987), the court of appeals did not rule that such damages were inappropriate, as suggested by Respondent. In fact, the appellee in *Gelof* conceded that such damages were proper under Title VII. The court of appeals merely vacated the tax enhancement remedy because the district court based the calculation on a back pay award that was eventually reduced on appeal. *Id.* at 455-56. The *Gelof* court remanded the case to the district court to re-calculate the tax enhancement award using the correct back pay figure. *Id.* at 456.

The Tenth Circuit also approved of such relief in *Sears v. Atchison, Topeka & Santa Fe Ry.*, 749 F.2d 1451 (10th Cir. 1984). The *Sears* court's dicta that such relief may not be appropriate in the typical Title VII case, *id.* at 1456, is no longer valid because the income-averaging provisions of the Internal Revenue Code have been repealed.

Petitioner timely raised this issue during trial, after the jury's verdict, during the district court's independent consideration of the back-pay award. The district court specifically invited the parties to brief this issue in greater detail, along with the punitive damages question, prior to the entry of judgment in the case. The affidavit Petitioner submitted in support of the request was not in the nature of expert testimony relating to contested opinions; rather, Petitioner's tax attorney merely applied the statutory income-tax rates to Petitioner's income, which was already in the record in connection with her damages testimony.

There is a growing trend among lower federal courts to recognize the tax-enhancement remedy as a legitimate and necessary part of Title VII's make-whole purposes. Lower courts need guidance from this Court on this important issue.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the initial Petition for Certiorari, Petitioner respectfully prays that the Court grant a writ of certiorari on all three questions presented.

Respectfully submitted,

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